Optima Direct
Rapp Collins

November 17, 2004

FILED ELECTRONICALLY

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-B204
Washington, DC 20554

CG Docket No. 02-278

Re: **Optima Direct, Inc.'s Comments In Support of American Teleservices Association, Inc. Petition For Declaratory Ruling**

Dear Ms. Dortch:

Optima Direct, Inc. ("ODI") respectfully submits these comments in support of the American Teleservices Association, Inc.'s ("ATA") Petition for a Declaratory Ruling to preempt certain provisions of the New Jersey Consumer Fraud Act ("New Jersey Act")[1] and New Jersey Administrative Code ("New Jersey Rules")[2] relating to telemarketing, as these provisions are significantly more restrictive than the Commission's Rules and Regulations implementing the Telephone Consumer Protection Act ("TCPA") of 1991 ("Commission Rules").[3]

1. Statement of Interest

ODI is the teleservices affiliate of Rapp Collins Worldwide, the world's largest integrated direct marketing agency and a member of the Omnicom Group. ODI, headquartered in Vienna, Virginia, manages a network of over 200 call centers and vendors across the United States, Canada and the Caribbean. ODI's diverse client base ranges from Fortune 500 companies to start-ups, including businesses in financial service, insurance, retail, utilities, political, fundraising, and consumer goods industries. ODI utilizes a network of outsourced call center vendors to initiate and receive telephone calls on its clients' behalf; ODI does <u>not</u> initiate calls itself.

ODI manages its clients' and vendors' compliance with all applicable state laws. Permitting states to implement and enforce more restrictive regulations on interstate telephone calls requires ODI to expend significantly higher compliance costs while probing through the plethora of inconsistent state restrictions to determine compliance requirements. This will also cause confusion amongst both subscribers and those who initiate the telephone calls.

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1 N.J. Stat. Ann. § 56:8-119, et seq. (West 2003).

2 N.J. Admin. Code tit. 13, § 45D (2004).

3 *Rules and Regulations Implementing the Telephone Consumer Protection Act* (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,174 (July 25, 2003) (to be codified at 47 C.F.R. pt. 64, 68).

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Office of the Secretary
Federal Communications Commission
November 17, 2004
Page 2

2. The New Jersey Act and the New Jersey Rules

The New Jersey Act and the New Jersey Rules directly conflict with, and are more restrictive than, the Commission Rules. They impose compliance burdens upon ODI, its clients and vendors which go substantially above and beyond those imposed by the Commission Rules.[4]

The Commission acknowledged the importance of supporting Congress' objective of creating uniform national rules:

> Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.
>
> We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.[5]

3. The New Jersey Rules Do Not Exempt Calls To Customers Who Previously Purchased a Product from ODI's Client Within Eighteen (18) Months Of The Date Of The Telemarketing Call From Its Do-Not-Call Restrictions.

ODI's clients maintain significant annual marketing budgets which utilize telemarketing to contact persons who previously purchased from the clients. These calls focus on both sales of the same products previously purchased and new products.

4 The Commission Rules authorize states to promulgate and enforce regulations that are more restrictive than those established by the Commission, but only with respect to intrastate telemarketing. 68 Fed. Reg. at 44,155.

5 68 Fed. Reg. at 44,155.

ODI's clients maintain significant annual marketing budgets which utilize telemarketing to contact persons who previously purchased from the clients. These calls focus on both sales of the same products previously purchased and new products.

The Commission Rules expressly authorize ODI's clients and vendors to initiate a telemarketing call to a subscriber whose telephone number is on the national do-not-call registry ("Registry"), provided the subscriber previously purchased a product from ODI's client within eighteen (18) months immediately preceding the date of the call.[6] By adopting this exemption, the Commission recognized that important aspects of the marketers' business plans are based upon contacting previous customers.[7] Moreover, the Commission recognized that customers typically expect to receive telephone solicitations from companies from whom they previously purchased products.[8]

The New Jersey Rules, on the other hand, provide a significantly narrower and more restrictive transaction-based exemption: ODI's vendors may initiate telephone solicitations to numbers on the Registry <u>only</u> if its clients *currently* transact business with the subscribers. The New Jersey Rules preclude the vendors from calling New Jersey residents who completed a purchase of a product within eighteen (18) months of the date of the call.

The restriction contained in the New Jersey Rules will have a severely detrimental effect on the marketing efforts of ODI and its clients and disregard the Commission's findings.

4. The New Jersey Rules Provide More Specific Disclosure Requirements Which Make Company-Specific Do-Not-Call Requests Applicable to ODI's Vendors and Clients

ATA's petition addresses the conflict between the disclosure requirements contained in the Commission Rules and the New Jersey Rules. The New Jersey Attorney General confirmed that company-specific do-not-call requests apply to ODI's clients and vendors:

> COMMENT: Commenters feel that by making telemarketers identify themselves to the consumer any do not call request will

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6 47 C.F.R. § 64.1200(f)(3) (2003).

7 68 Fed. Reg. at 44, 147.

8 68 Fed. Reg. at 44, 158.

> apply to the telemarketer as well as to the seller for whom the telemarketer is making the call.
>
> RESPONSE: The commenters are correct in that the rules require any do not call request made by a consumer to apply to the telemarketer itself as well as the seller.[9]

ODI agrees with the ATA that such an interpretation is unprecedented.[10] Since a single such request by a consumer will prevent the vendor from calling the consumer again on behalf of <u>any</u> seller, it will create undue hardship on ODI and its clients when attempting to outsource telemarketing programs.

The Commission Rules do <u>not</u> have the same effect. Company-specific do-not-call requests apply only to the seller on whose behalf the call was made and do not apply to the telemarketer.

Enforcement of the Commission Rules will greatly reduce the number of telemarketers available to perform telemarketing services for sellers. ODI and its clients will be forced to break-up programs by vendors, depending upon the contents of the vendors' respective internal do-not-call lists. It will result in higher compliance costs for ODI, its clients and vendors, result in consumer confusion and ultimately result in higher prices.

5. Conclusion

The provisions of the New Jersey Act and New Jersey Rules discussed above impose regulatory requirements on ODI, its clients and vendors that are far more restrictive than those imposed by the Commission Rules. New Jersey's more restrictive regulations contravene the clear intent of Congress to create uniform national rules, and to ensure that individual privacy rights and public safety interests are balanced with the legitimate interests of telemarketers to engage in commercial speech and trade. The New Jersey Act and New Jersey Rules disregard

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9 N.J. Reg. v. 36, n. 10, cmt. 44 (May 17, 2004) (Attached at Exhibit 2).

10 American Teleservices Association, Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code, CG-Docket No. 02-278, (August 24, 2004).

For the reasons cited herein, ODI supports ATA's petition, and urges the Commission to preempt those provisions of New Jersey's Rules which are more restrictive than the Commission Rules.

Respectfully submitted,

Greg Kapuscinski
General Manager